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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

WEIBAO SHEN et al.,

Plaintiffs and Respondents,

v.

JINGHAN LIU, as Personal
Representative, etc.,

Defendant and Appellant.

B286331

(Los Angeles County
Super. Ct. No. EC062923)

APPEAL from a judgment and an order of the Superior Court for Los Angeles County, William D. Stewart, Judge. Affirmed.

Peter D. Gordon and Associates, Andrew Schoettle and Peter D. Gordon for Defendant and Appellant.

Law Offices of Steven P. Scandura, Steven P. Scandura; and Howard Posner for Plaintiffs and Respondents.

Jinghan Liu, as personal representative of Ling Ling Zhang, appeals from the judgment entered against Zhang following a court trial and from the order denying Zhang's motion to vacate the judgment and granting the motion for attorney fees filed by plaintiffs Weibao Shen, Jai Li Chai, Huizhen Shi, Yi Jia Yin, and Xin Li.¹ Liu contends that (1) plaintiffs lacked standing to bring their claims as direct claims rather than derivative corporate claims, and therefore the trial court did not have jurisdiction to hear those claims; (2) the trial court improperly awarded treble damages to plaintiffs under Penal Code section 496, subdivision (c) (hereafter, section 496(c)) because no such claim was pleaded in the complaint; and (3) the trial court failed to reduce the judgment against Zhang by the amount paid in settlement by Zhang's co-defendants.

Unfortunately for Liu, the record before us is extraordinarily incomplete. There was no court reporter during the trial, and thus no reporter's transcript of the trial (although there is a reporter's transcript of the hearings on the post-judgment motions). There is no statement of decision because neither side requested one. Liu failed or was unable to obtain a settled statement for the appeal under California Rules of Court, rule 8.137. Even the appellant's appendix is

¹ Defendant Ling Ling Zhang died after judgment was entered against her, while her motion to vacate the judgment was pending. After Zhang's death, Liu was substituted into the case as her personal representative. He filed the reply to the motion originally filed by Zhang as well as the opposition to plaintiffs' motion for attorney fees, and filed the notice of appeal from the judgment and the orders denying the motion to vacate the judgment and granting plaintiffs' motion for attorney fees.

incomplete.² For example, although it includes Zhang's motion to vacate the judgment and points and authorities in support of the motion, as well as plaintiffs' brief in opposition to that motion, it does not include the exhibits that were filed to support the factual assertions made in the moving and opposition briefs -- exhibits that might have shed some light on the issues raised in this appeal. Because the record before us does not provide the information necessary to fully evaluate Liu's claims of error, we conclude that the judgment and post-judgment order must be affirmed.

BACKGROUND

Our recitation of the procedural and factual background is limited due to the paucity of the record on appeal. In August 2014, plaintiffs filed a complaint against Zhang, Jian Ming Gao (J. Gao), and Fei Gao (F. Gao), alleging claims for breach of contract, fraud by fiduciaries, securities fraud, and fraudulent conveyance. The complaint alleged that plaintiffs were induced by Zhang and J. Gao to invest money and buy shares in two companies that Zhang and J. Gao had recently formed, American Pine Bio-tech, Inc. (American Pine) and Consumer

² The appellant's appendix consists of: (1) the complaint; (2) minute orders from the trial; (3) the settlement agreement between Zhang's co-defendants and plaintiffs; (4) the judgment; (5) the briefs (but not the exhibits) filed in support of and opposition to Zhang's motion to vacate the judgment; (6) the moving papers and opposition to plaintiffs' motion for attorney fees; (7) minute orders related to the motion to vacate and motion for attorney fees; (8) the notice of appeal and designation of record; (9) the exhibits admitted at trial; and (10) the register of actions from the trial court.

Capital Group, Inc. (CCGI-Cal.) Zhang and J. Gao told plaintiffs that their shares soon would be available to be traded on the open market, and that each of the shares would be worth \$50 when one of the companies became a public company.

The complaint alleged that each plaintiff paid certain amounts to defendants, either with checks made payable to American Pine or with cash, and each plaintiff was issued shares in either American Pine or CCGI-Cal.³ The total amount paid by all plaintiffs was \$55,000. Four of the five plaintiffs made the payments in July or August of 2007; each of the checks for those payments was made out to American Pine. The payment by the fifth plaintiff (Yijia Yin) was made in October 2010, apparently in cash.

The complaint described various asset transfers, formations of subsidiaries, and acquisitions involving American Pine, CCGI-Cal., and other companies, resulting in a new company named Consumer Capital Group Inc., a Delaware corporation (CCGI-Del.), which was a publicly-traded company, to which all of the assets of American Pine and CCGI-Cal. had been transferred. The complaint alleged that the transfers, formations, and acquisitions were allegedly done by defendants without informing plaintiffs and for the alleged purpose of “cutting Plaintiffs out

³ The amounts paid and shares issued were: \$10,000 by Jiabin Chai (182,000 shares of CCGI-Cal.); \$2,500 by Huizhen Shi (5,000 shares of American Pine); \$2,500 by Xin Li (5,000 shares of American Pine); \$10,000 by Weibao Shen (20,000 shares of American Pine); \$30,000 by Yijia Yin (25,000 shares of CCGI-Cal.).

of the newly formed company” (i.e., CCGI-Del.) and leaving them “with stock in an empty shell of a California company.”

The complaint alleged that the \$55,000 plaintiffs invested with defendants represented 7.6389 percent of the investment in CCGI-Del., which company, based upon its highest traded price per share, was worth \$273,888,891. In each of the first three causes of action (for breach of contract, fraud by fiduciaries, and securities fraud), plaintiffs sought to recover the value of 7.6389 percent of CCGI-Del.’s stock based upon the initial trading price of \$3.00 per share.⁴ Plaintiffs sought to recover the same sums in the fourth cause of action for fraudulent conveyance, although the complaint did not specifically allege the method of calculation.

The trial was held without a jury over three days. Zhang and J. Gao were not represented by counsel at trial (although apparently they had counsel earlier in the proceedings), and neither they nor plaintiffs arranged for a court reporter to be present during the trial. On the first day, May 15, 2017, the court entered F. Gao’s default, as he had not filed a responsive pleading. On the second day, May 16, 2017, the parties announced a partial settlement between plaintiffs on the one hand and F. Gao and J. Gao on the other hand, but the case proceeded against Zhang, who continued to represent herself. Closing arguments were heard on the third day, May 26, 2017, after which the trial court

⁴ Specifically, plaintiffs sought the following damages: \$2,206,790.14 for Jiabin Chai; \$303,130.51 for Huizhen Shi; \$303,130.51 for Xin Li; \$303,130.51 for Yijia Yin; and \$1,212,522.05 for Weibao Shen.

found “in favor of Plaintiff[s] and against defendant, Ling Ling Zhang, as prayed in the complaint and pursuant to testimony by Plaintiff[s]’ witnesses.” The court ordered plaintiffs’ counsel to prepare and submit the judgment.

Plaintiffs’ counsel submitted a proposed judgment, which was served on all three defendants, on May 26, 2017, the day the court announced its ruling. The trial court signed and entered the judgment, without objection by Zhang or modification by the court, on July 5, 2017. In the judgment, the court stated it found “that Plaintiffs have proven their case against Defendant LING LING ZHANG as to fraud and breach of contract, in the amount of \$55,000.” The judgment also stated that the court found that “Penal Code §496(c) applies and that Plaintiffs are entitled to treble damages and attorney fees.” Finally, the judgment stated: “The Court finds that all Plaintiffs are entitled to Judgment against Defendant LING LING ZHANG, and interest thereon from August 6, 2012, and treble damages. The Court accepts Plaintiffs’ calculation of the credits to which Defendant LING LING ZHANG is entitled on account of the settlement between Plaintiffs and Defendants JIAN MING GAO and FEI GAO, and determines that a net judgment shall be entered, after subtracting the credits for the settlement, as follows:

<u>Plaintiff</u>	<u>Net Money</u>	<u>Treble</u>	<u>Interest</u>	<u>TOTAL DUE</u>
	<u>Lost</u>	<u>Damages</u>		
Weibao Shen	\$6,139.57	\$18,418.72	\$2,980.64	\$21,399.35
Jai Li Chai	\$2,974.02	\$8,922.07	\$1,443.83	\$10,365.89
Huizhen Shi	\$1,534.89	\$4,604.68	\$745.16	\$5,349.84
Yi Jia Yin	\$28,841.87	\$86,525.62	\$14,002.14	\$100,527.75
Xin Li	\$1,534.89	\$4,604.68	\$745.16	\$5,349.84

TOTAL: \$41,025.25 \$123,075.76 \$19,916.92 **\$142,992.67”**

(Boldface in original.)

On August 3, 2017 -- almost a month after judgment was entered -- Zhang, represented by counsel, filed a motion to vacate the judgment and enter a different judgment. She argued the motion was timely because she had not been served with a notice of entry of judgment (nor, presumably had she been served with the signed judgment itself). Although we cannot confirm this assertion because the record does not include the documents cited in the points and authorities, we assume it is correct because plaintiffs did not contest it in their opposition to the motion.

In her moving papers, Zhang argued that the trial court’s award of treble damages under section 496(c) was improper for two reasons. First, Zhang argued that the required procedural safeguards for imposing treble damages under section 496(c) were not followed, in that plaintiffs did not plead a cause of action for violation of Penal Code section 496, and the judgment did not include any findings of facts to

support a finding that that statute was violated.⁵ Second, she contended that under case law, plaintiffs cannot recover both for fraud and for a violation of Penal Code section 496.

In their opposition to the motion, plaintiffs contended that Zhang and the other defendants were on notice that plaintiffs were seeking treble damages under section 496(c) for more than 19 months before the start of trial. In support of this contention, plaintiffs cited to several documents, including plaintiffs' mandatory settlement conference brief and their trial brief, in which this issue was raised; those documents are not included in appellant's appendix. Plaintiffs also noted that the section 496(c) issue was discussed between plaintiffs' counsel, Zhang, and the trial court on multiple occasions before the trial, and was argued at length at the trial; at no time did Zhang (or her counsel, when she had counsel) object that the issue was not properly pleaded. With regard to Zhang's second contention, plaintiffs explained that although the judgment found in favor of plaintiffs with regard to fraud and Penal Code section 496, it did not award duplicative or cumulative damages. Finally, plaintiffs argued there was sufficient evidence for the trial

⁵ Penal Code section 496 provides in relevant part: "(a) Every person who buys or receives any property that has been stolen or that has been obtained in any manner constituting theft or extortion, knowing the property to be so stolen or obtained, or who conceals, sells, withholds, or aids in concealing, selling, or withholding any property from the owner, knowing the property to be so stolen or obtained, shall be punished by imprisonment in a county jail for not more than one year [¶] . . . [¶] (c) Any person who has been injured by a violation of subdivision (a) or (b) may bring an action for three times the amount of actual damages, if any, sustained by the plaintiff, costs of suit, and reasonable attorney's fees."

court to have found a violation of the statute, and that Zhang waived findings of fact by failing to request a statement of decision.

Zhang passed away shortly after her motion to vacate the judgment was filed, and her son, Liu, who was substituted in as her personal representative, filed the reply in support of the motion. The reply raised for the first time two of the three issues raised in this appeal. First, Liu argued that the trial court lacked jurisdiction to hear plaintiffs' lawsuit because plaintiffs had no standing to bring direct claims against Zhang, an officer of the corporation of which they were shareholders, and could only bring those claims in a derivative action on behalf of the corporation. Second, he contended that the trial court failed to credit properly the amounts paid by J. Gao and F. Gao as part of their settlement with plaintiffs.

The hearing on the motion to vacate the judgment was originally scheduled for September 1, 2017, but was continued to September 22, 2017 due to Zhang's death. Shortly after the trial court granted the continuance, plaintiffs filed a motion for attorney fees under section 496(c), as well as under the Securities Act of 1933 (15 U.S.C. § 77k(e)) and the Securities Act of 1934 (15 U.S.C. § 78r(a)). Plaintiffs sought \$148,837.50 in attorney fees and costs, which included \$8,217.50 in fees for a Chinese language interpreter. Liu opposed the motion on several grounds, including that there was no finding of liability under the federal statutes and the finding of liability under Penal Code section 496 was improper. Liu also challenged the recovery of interpreter fees under any statute.

Several days before the hearing on the motion to vacate the judgment, the trial court posted a detailed tentative ruling denying the motion; the ruling addressed only the section 496(c) issue. In the tentative ruling, the trial court described plaintiffs' case as follows: "This case arises from the Plaintiffs' claim that they suffered damages because the Defendants fraudulently induced them to invest in worthless stock." Addressing the motion, the court noted that "[a] problem for the Defendant is that no request for a statement of decision was made in this case. As a result, there is no statement of decision to amend and correct and no basis to find that there was an incorrect or erroneous legal basis for the decision."

The court acknowledged that a claim under Penal Code section 496 had not been pleaded in the complaint. But it observed that plaintiffs had stated in several pretrial documents that they were seeking treble damages and attorney fees under section 496(c), that the issue was discussed at trial, and that plaintiffs had presented substantial evidence that established their right to relief under section 496(c). The court also noted that the treble damages remedy was identified in the proposed judgment, to which Zhang made no objection. The court observed that a "trial court has broad discretion to grant or deny an amendment to the complaint at trial, and California courts have been extremely liberal in allowing such amendments to conform to proof," including when the amendment gives rise to a separate cause of action based on the same general set of facts. The court stated that it would entertain such a motion from plaintiffs and issue an order nunc pro tunc; the court declared "there [were] grounds to grant such a

motion because the original Complaint pleads sufficient facts to warrant the remedy, the claim is based on the same general set of facts as the other claims, and the amendment is not prejudicial to the Defendant, who was informed and advised that the Plaintiffs were seeking treble damages and attorney's fees under Penal Code section 496(c) on numerous occasions."

Finally, the court rejected Zhang's argument that it did not make the required findings under Penal Code section 496. The court observed that Zhang did not request a statement of decision, and therefore it is assumed that "the trial court made whatever findings are necessary to sustain the judgment." (Citing *Michael U. v. Jamie B.* (1985) 39 Cal.3d 787, 793.) The court also rejected Zhang's argument that she was subject to "double liability" by having been found liable for both fraud and violation of section 496(c), stating that "there [was] no basis to find in the judgment that the Defendant has been subject to double liability for receiving money fraudulently obtained from the Plaintiffs."

At the hearing on the motion to vacate the judgment, Liu's counsel noted that the tentative ruling did not address the new arguments he had raised in the reply brief in support of the motion.⁶ He explained that the reply brief was filed the day after the tentative ruling was posted (although he stated he had not seen the tentative ruling before filing the reply brief). Because the court had not reviewed the reply brief, the court concluded it would put the matter over to the next hearing, and that plaintiffs would be given an opportunity to address in

⁶ There was a court reporter at this hearing, as well as the subsequent hearing discussed below.

a short sur-reply brief the argument that their claims were required to be brought in a derivative action.

Before the court adjourned, Liu's counsel sought to "bring one set of facts to [the court's] attention while [it] consider[ed] the situation." As counsel began to address the allegations of the complaint, the court interrupted, saying, "Well, we tried the case. Everything merges with the trial." Nevertheless, counsel continued, and started to address why the complaint did not allege any conduct that could be found to violate Penal Code section 496. The court again interrupted, and said, "Oh, you're at a disadvantage because when we tried the case, I didn't know about the complaint. I just know about the case that was tried." The hearing ended, with the matter continued to the date set for the hearing on plaintiffs' motion for attorney fees.

After the initial hearing, plaintiffs filed their sur-reply brief. They argued that Liu's contention that the trial court lacked jurisdiction to render a judgment because plaintiffs were required to bring their lawsuit as a derivative action was based upon a misperception of plaintiffs' claims. They explained that their lawsuit asserted that Zhang and the other defendants committed fraud by selling them fake shares of stock, and by taking the money plaintiffs had paid without actually investing it in the company plaintiffs thought they had invested in. Therefore, plaintiffs argued that their claims were personal to plaintiffs, rather than derivative claims that belonged to the corporation.

Plaintiffs also addressed Liu's argument that the judgment failed to take into account plaintiffs' settlement with Zhang's co-defendants.

They argued that the judgment amounts were calculated on a spreadsheet, which was a demonstrative exhibit at trial, that assigned credit for the shares conveyed by the co-defendants as part of the settlement.

Finally, plaintiffs asked the court to amend their complaint to conform to the proof at trial with regard to the section 496(c) claim, such that the complaint be deemed to state a cause of action under that statute.

Before the continued hearing, the trial court once again posted a tentative ruling addressing both the motion to vacate the judgment and the motion for attorney fees. The portion devoted to the motion to vacate was exactly the same as the previous tentative ruling; it did not address Liu's arguments regarding plaintiffs' lack of standing or the failure of the judgment to account for the sums received by plaintiffs as a result of their settlement with the co-defendants. The tentative ruling also did not acknowledge plaintiffs' request that the court amend the complaint to conform to the proof at trial; it continued to state that the court would entertain such a motion and that ground for amendment existed. Finally, the tentative ruling stated that plaintiffs were entitled to attorney fees, and that the requested fees were reasonable with the exception of the fees requested for the Chinese language interpreter, which the court found were not recoverable; thus, it proposed to award \$123,800 in attorney fees.

At the hearing, Liu's counsel noted that the tentative ruling did not address his argument that plaintiffs' claims were derivative claims and that plaintiffs did not have standing to maintain them because they

failed to follow mandatory procedures. Plaintiffs' counsel argued that Liu's counsel was mistaken regarding the facts, and reminded the court that there was "no evidence that there . . . were legitimate stock sales. There[was] no evidence that what was sold to [plaintiffs] were real stocks. . . . There[was] no evidence that [plaintiffs] ever had shares[,] . . . that the documents my clients were given were real." Counsel stated that the only "evidence was that [plaintiffs] gave Ms. Zhang some money, and they got what appeared to be fake or worthless documents in exchange." He explained that the allegations in the complaint regarding the various transfers, creations of subsidiaries, and acquisitions involving the various companies were relevant only to show that plaintiffs gave money to Zhang but never got any ownership interest in any of those companies.

After hearing argument on other issues, including Liu's argument that the judgment failed to offset the amounts that plaintiffs received in the settlement with the co-defendants and plaintiffs' request for attorney fees, the court stated it was going to adopt the tentative ruling as its order on the motions. Liu timely filed a notice of appeal from the judgment and the post-judgment order.

DISCUSSION

On appeal, Liu contends the trial court erred by (1) failing to find that plaintiffs lacked standing to bring their action because it could be brought only as a derivative action; (2) finding that Zhang violated Penal Code section 496 and awarding treble damages; and (3) failing to make the proper pro tanto settlement reduction under Code of Civil

Procedure section 877. We conclude that, due to the extremely limited record, Liu has failed to demonstrate error.

A. *Rules Governing Appellate Review*

The Supreme Court recently explained the problems facing an appellant in a case in which no court reporter was present at trial. It observed that “the absence of a court reporter at trial court proceedings and the resulting lack of a verbatim record of such proceedings will frequently be fatal to a litigant’s ability to have his or her claims of trial court error resolved on the merits by an appellate court. This is so because it is a fundamental principle of appellate procedure that a trial court judgment is ordinarily presumed to be correct and the burden is on an appellant to demonstrate, on the basis of the record presented to the appellate court, that the trial court committed an error that justifies reversal of the judgment. [Citations.] ‘This is not only a general principle of appellate practice but an ingredient of the constitutional doctrine of reversible error.’ [Citations.] ‘In the absence of a contrary showing in the record, all presumptions in favor of the trial court’s action will be made by the appellate court. “[I]f any matters could have been presented to the court below which would have authorized the order complained of, it will be presumed that such matters were presented.” [Citation.] “A necessary corollary to this rule is that if the record is inadequate for meaningful review, the appellant defaults and the decision of the trial court should be affirmed.” [Citation.] ‘Consequently, [the appellant] has the burden of providing an adequate record. [Citation.] Failure to provide an adequate record on an issue

requires that the issue be resolved against [the appellant].’ [Citation.]” (*Jameson v. Desta* (2018) 5 Cal.5th 594, 608-609.)

In this case, Liu’s problems are even greater in light of the fact that none of the parties asked the trial court for a statement of decision. “A proper statement of decision is . . . essential to effective appellate review. ‘Without a statement of decision, the judgment is effectively insulated from review by the substantial evidence rule,’ as we would have no means of ascertaining the trial court’s reasoning or determining whether its findings on disputed factual issues support the judgment as a matter of law.” (*Thompson v. Asimos* (2016) 6 Cal.App.5th 970, 982.) Moreover, where the parties failed to request a statement of decision, “we must assume that the trial court made whatever findings are necessary to sustain the judgment.” (*Michael U. v. Jamie B., supra*, 39 Cal.3d at p. 793.)

With these rules of appellate review in mind, we turn to Liu’s contentions.

B. *The Limited Record Does Not Support Liu’s Contention That Plaintiffs’ Claims Had To Be Brought In a Derivative Action*

Liu raises several arguments with respect to his contention that plaintiffs’ claims had to be brought in a derivative action. The underpinning of all but one of the arguments is the premise that plaintiffs’ claims were based upon undervaluation or dilution of their corporate shares, and therefore were claims common to all shareholders rather than individual claims. The remaining argument is that the trial court failed to rule on the derivative action issue or make findings

regarding the jurisdictional basis of plaintiffs' case. His arguments fail because the record does not affirmatively demonstrate error.

In the introduction to the appellant's opening brief, Liu states that "it is readily apparent from available parts of the record" that plaintiffs' "claim for damages is based on the devaluation of Plaintiffs-Respondents' shares in a merger with [CCGI-Del.]," and that such a claim is "categorized by statute and precedent as a classic claim involving harm to all shareholders and thus must be pled and prosecuted as a derivative action." He concludes that "the finding by the trial court that [Zhang] was liable in damages for the dilution in the value of [plaintiffs'] shares, based on a direct action, is a jurisdictional error."

Liu's description of the basis of plaintiffs' claims is based upon his interpretation of the allegations of the complaint. If this case had ended at the demurrer stage, reliance on those allegations would have been appropriate. But this case comes to us following a trial and the denial of a motion to vacate the judgment. As the trial court noted at the first hearing on the motion to vacate the judgment, "when we tried the case, I didn't know about the complaint. I just know about the case that was tried."

We cannot know with certainty what plaintiffs' theory of the case was at trial, because there is no reporter's transcript of the trial and no statement of decision, and none of the documents that might have illuminated the plaintiffs' theory (such as their responses to discovery, their mandatory settlement conference brief, or their trial brief) is included in the record on appeal. But based upon the record before us,

and making, as we must, all presumptions in favor of the trial court's rulings (*Jameson v. Desta*, *supra*, 5 Cal.5th at p. 609), it appears that plaintiffs' claims were not based upon devaluation or dilution of their corporate shares such that they had to have been brought in a derivative action.

First, in its ruling denying the motion to vacate the judgment, the trial court that presided over the trial described plaintiffs' case as arising "from the Plaintiffs' claim that they suffered damages because the Defendants fraudulently induced them to invest in worthless stock." Second, at the continued hearing on the motion to vacate the judgment, plaintiffs' counsel -- who had represented plaintiffs throughout the case -- noted that the evidence that was presented was that Zhang induced plaintiffs to give her money for an investment in her companies, but that she took the money for herself and gave them fake or worthless documents, and the trial court appeared to agree with counsel's representation of the evidence.

Finally, plaintiffs' counsel's characterization of the evidence -- which appears to be a classic case of fraud (as well as breach of contract) -- is consistent with the judgment. Not only does the judgment state that plaintiffs proved fraud, breach of contract, and violation of Penal Code section 496, the damages awarded are consistent with a finding of fraud/breach of contract rather than a claim of dilution or devaluation of corporate shares. The damages the trial court found -- before offsetting for the amounts recovered by the settlement with the co-defendants or tripling under section 496(c) --

were \$55,000, i.e., the amount of money that plaintiffs gave to Zhang for the purported investment.

The fact that the trial court did not make an express ruling or findings on the derivative action issue raised by Liu does not give rise to reversible error. When a trial court does not address an argument in its ruling, we may infer its implied rejection of that argument. (*Roman v. Superior Court* (2009) 172 Cal.App.4th 1462, 1479, fn. 4, citing *In re Marriage of Arcneaux* (1990) 51 Cal.3d 1130, 1133-1134.)

In short, Liu has failed to demonstrate that the trial court did not have jurisdiction over plaintiffs' claims or that it committed reversible error by denying the motion to vacate the judgment on this ground.

C. *The Limited Record Does Not Support Liu's Contention That the Trial Court Erred By Finding That Zhang Violated Penal Code Section 496 and Awarding Treble Damages*

Liu contends the trial court erred in finding that Zhang violated Penal Code section 496 and awarding treble damages because (1) plaintiffs failed to plead a claim under section 496(c) in the complaint and no motion for leave to file an amended complaint was filed or ruled upon; and (2) the elements of a claim under Penal Code section 496 were not satisfied. The record on appeal does not demonstrate any reversible error.

With regard to Liu's first argument, the trial court found, in denying the motion to vacate the judgment, that plaintiffs had provided ample notice to Zhang that they were seeking treble damages under section 496(c), that the parties and the court discussed the issue at trial,

that the remedy was identified in the proposed judgment, and that Zhang had never raised any objection to the claim. In the absence of anything in the record to dispute this, we presume the trial court's finding was correct. (*Jameson v. Desta*, *supra*, 5 Cal.5th at p. 609.)

The court also found that there were sufficient grounds to grant a motion to amend the complaint according to proof at trial. Liu does not challenge this finding. Instead, he contends that the award of treble damages under section 496(c) was error because no such motion was made or granted. To the extent Liu argues that plaintiffs did not make a separate motion for leave to file an amended complaint, it appears that he is correct. However, plaintiffs did include a request that the complaint be amended to conform to the proof at trial in their sur-reply to the motion to vacate the judgment. And given the trial court's statements in its ruling denying the motion to vacate the judgment -- i.e., that there were grounds to grant a motion to amend the complaint to conform to proof -- we presume the court impliedly granted plaintiffs' request. In any event, we find no error in the court's finding that section 496(c) applied, even in the absence of an nunc pro tunc order amending the complaint to include a claim under section 496(c). "That the issues were not pleaded does not preclude their adjudication where a case is tried on the merits, as here, the issues thoroughly explored during trial, and the theory of the trial well known to court and counsel." (*Bruckman v. Parliament Escrow Corp.* (1987) 190 Cal.App.3d 1051, 1060.)

With regard to Liu's second argument -- that there are no facts to support a finding that Penal Code section 496 applies to the conduct at

issue -- the absence of a reporter's transcript of the trial or a statement of decision precludes us from reviewing the assertion. In the judgment, the trial court found that section 496(c) applied. The court also found in its ruling denying the motion to vacate the judgment that "Plaintiffs offered substantial evidence that established their right to relief under Penal Code section 496(c)." Liu's "[f]ailure to provide an adequate record on [this] issue requires that the issue be resolved against [him]." (*Jameson v. Desta, supra*, 5 Cal.5th at p. 609.)

D. *The Limited Record Does Not Support Liu's Contention That the Trial Court Failed To Properly Reduce the Judgment To Account For the Settlement*

Liu contends that the trial court did not properly take into account the amount of the settlement with the two co-defendants when it reduced the judgment to be imposed upon Zhang. He argues that the trial court's analysis, which in essence valued the settlement at \$13,974.75, fails "[f]or obvious reasons." Without a reporter's transcript or statement of decision, however, we can find no failure, "obvious" or not. Although Liu refers to the settlement as one for \$250,000, we note that the settlement agreement called for the transfer of shares of stock in CCGI-Del. that purportedly was valued at \$250,000, rather than cash. We also note that the agreement provides that if plaintiffs were not able to sell those shares for at least \$250,000 on the six-month anniversary following the transfer, the co-defendants would issue such additional shares so that plaintiffs would be able to sell them for a minimum of \$250,000. However, from the language in the judgment, it

appears that plaintiffs presented evidence to show that the shares were not (and presumably would never be) worth \$250,000. There is no record of what that evidence was, or how the value was calculated. In the absence of that record, we must presume sufficient evidence was presented to support the trial court's determination of the pro tanto settlement reduction. (*Jameson v. Desta, supra*, 5 Cal.5th at p. 609.)

DISPOSITION

The judgment and post-judgment order are affirmed. Plaintiffs shall recover their costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

WILLHITE, J.

We concur:

MANELLA, P. J.

COLLINS, J.